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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 05 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to permanently employ the beneficiary in the United States as an assistant professor. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is November 9, 2007, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

At issue in this case is whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986); *see also Madany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney*, 661 F.2d 1 (1st Cir. 1981).

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

has the following minimum requirements:

H.4 Education: Doctorate
H.4.B Major Field of Study: Spanish
H.5 Training: None required
H.6 Experience in the job offered: None required
H.7 Acceptable alternate field of study: None
H.8 Acceptable alternate combination of education and experience: None
H.9 Foreign educational equivalent: Not accepted
H.10 Experience in an alternate occupation: None accepted
H.11 Job Duties: Teaching courses in the areas of Spanish language and literature; engaging in research in a selected field of study; duties assigned by CBA workload agreement; advising thesis students when selected. Supervised by the Chair of the Modern and Classical Languages Department, who reports to the Dean of the College.
H.14 Specific skills or other requirements: None required

Therefore, the labor certification states that the offered position requires a doctorate degree in Spanish. The labor certification does not permit an alternate field of study, an alternate combination of education or experience, or a foreign educational equivalent degree.

The record of proceeding contains a copy of the beneficiary's diploma for a Doctor of Education (Ed.D.) in Technology Education from the West Virginia University College of Human Resources and Education, issued on May 13, 2007.[3] The record also contains a copy of the beneficiary's doctoral dissertation, titled [redacted]

The record also contains copies of documents generated during the labor certification process, including:

- Advertisement for multiple openings at the petitioner in the February 9, 2007 *Chronicle of Higher Education*. One of the positions listed in the advertisement is for "Assistant Professor Modern & Classical Language Studies." The advertisement states: "Tenure-track position in Spanish. The successful candidate must demonstrate excellence in teaching and an interest in teaching undergraduate students." The advertisement does not specify the required education for the position.

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[3] The beneficiary's resume states that he obtained a Master of Arts in Secondary Education with a concentration in Teaching Spanish as a Second Language from West Virginia University College of Human Resources and Education in 2003, and a Master of Arts in Foreign Languages with concentrations in Teaching English and Spanish as a Second Language from West Virginia University Eberly College of Arts and Sciences, also in 2003. The record contains a copy of the beneficiary's two Master of Arts diplomas.

- Notice of filing the labor certification (Notice) provided to the applicable bargaining representative pursuant to 20 C.F.R. § 656.10(d)(1)(i). The job opportunity described on the Notice is "Assistant Professor, Spanish." The Notice states that the position requires a "Ph.D. in Spanish Language or Spanish Pedagogy."

- A "Search Profile" for the offered position, which states that the position of "Assistant Professor of Spanish" requires a "Ph.D. in Spanish Language or Spanish Pedagogy. ABD's will be considered if degree requirements are completed by August 2007. Area of research specialization is open."

The director denied the petition on September 11, 2008. The decision states that the beneficiary does not possess a doctorate degree in Spanish as required by the terms of the labor certification. The decision also notes that the petitioner did not provide copies of the beneficiary's educational transcripts to determine the concentration of study of his doctorate degree.

Counsel appealed the director's decision on October 9, 2008. The appeal argues that: the petitioner intended for the labor certification to state that the offered position required a "Ph.D in Spanish or Spanish Pedagogy," instead of only a doctorate in Spanish; that the omission of the phrase "or Spanish Pedagogy" on the labor certification is a "harmless and unintentional error;" and that the evidence submitted establishes and that the beneficiary's Ed.D. in Technology Education meets the definition of a Ph.D. in Spanish Pedagogy.[4]

Evidence submitted by counsel on appeal includes the following:

- The beneficiary's graduate transcripts from West Virginia University.

- Affidavit from [redacted], Chair of the Search Committee for the offered position, dated September 29, 2008. [redacted] testifies that the offered position requires a Ph.D. in Spanish Language or Spanish Pedagogy, and that the beneficiary's Ed.D. in "Instructional Design and Technology in Foreign Languages Acquisition" meets the requirement for a Ph.D. in Spanish Pedagogy. [redacted] states that this determination was made in

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[4] The labor certification states that the position requires a "doctorate." Counsel now claims that the petitioner intended to require a "Ph.D in Spanish or Spanish Pedagogy." It is noted that the beneficiary possesses a Doctor of Education degree (Ed.D), not a Ph.D. However, an Ed.D is a research doctorate degree accepted by the National Science Foundation as equivalent in content and level to a Ph.D degree. *See* www2.ed.gov/about/offices/list/ous/international/usnei/us/doctorate.doc (accessed September 23, 2010). Therefore the AAO considers an Ed.D degree to meet the definition of a "doctorate" degree as well as a "Ph.D." For a discussion of the similarities and differences between the Ph.D. and the Ed.D. *see Legitimacy, Differentiation and the Promise of the Ed.D. in Higher Education,* Douglas, T. J., presented at the Annual Meeting of the Association for the Study of Higher Education (2002)(accessed on September 23, 2010 at http://www.usc.edu/dept/chepa/pdf/ASHE_toma.pdf).

consultation with the [redacted]

- Affidavit of [redacted], at West Virginia University College of Human Resources and Education, dated October 1, 2008. In the affidavit, [redacted] testifies about the school's doctoral program and the beneficiary's academic performance. The affidavit states that the Technology Education program is designed to enable its graduates to:

> implement state-of-the-art technology in the support of teaching and learning. Students come to this program from a variety of professional and academic backgrounds such as graphic design or the foreign language instruction. Given the wide range of educational backgrounds as well as the personal goals of our students, the focus of an individual student's study is unique.

The affidavit states that the beneficiary's coursework emphasized Spanish language instruction in conjunction with the use of computer-mediated communications, and included 48 credits specifically relating to the Spanish language. The affidavit states that the beneficiary's course work emphasized Spanish literature and culture, and he wrote five term papers on the application of technology to the teaching of Spanish. The affidavit also states that, as a graduate student, the beneficiary worked as a teaching assistant and taught introductory Spanish 101 and intermediate level Spanish 203 and 204.

The plain language of the labor certification unequivocally requires an individual with a doctorate degree in Spanish. The evidence in the record does not establish, and counsel does not claim, that the beneficiary possesses a doctorate in Spanish. The labor certification explicitly does not permit an alternative field of study, an alternative combination of education and experience, or even a foreign degree equivalent. Counsel claims that the omission of "Spanish Pedagogy" as an acceptable alternative field of study was unintentional, and requests that USCIS look beyond the requirements stated on the labor certification and consider evidence of the petitioner's intent, such as the Notice submitted to the bargaining representative during the labor certification process. In short, the petitioner is requesting that USCIS change the terms of the labor certification to state what counsel claims the petitioner actually meant it to say.

At this point, it is important to provide an overview of the general process of procuring an employment-based immigrant visa and the respective roles of the DOL and USCIS.

As noted above, the labor certification is certified by the DOL. The DOL's role in this process is defined by section 212(a)(5)(A)(i) of the Act, which states:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the responsibilities assigned to the DOL by the Act or the implementing regulations at 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[5] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d at 1012-1013.

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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[5] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d at 1008. The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS (formerly INS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

In carrying out this responsibility, USCIS is obligated to "examine the certified job offer *exactly as it is completed* by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7. "To require USCIS to go beyond

the [labor] certification's plain language [would] undermine the agency's role in independently determining whether the alien meets the specified requirements." *Id.*

The requirements of the offered position as set forth on the labor certification are unequivocal. USCIS cannot change or modify the labor certification. Even if counsel submits evidence demonstrating that the labor certification states something different than what the petitioner intended it to say, the USCIS is bound by the plain language of the labor certification. When the terms of a labor certification are ambiguous, USCIS may consult additional evidence of the petitioner's intent to determining the meaning of that term. However, there is no ambiguity here. The labor certification states that the job offered requires an individual with a doctorate degree in Spanish. The evidence in the record does not establish that the beneficiary has such a degree, nor does counsel claim that the beneficiary has such a degree.

Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.